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SUPREME COURT, U.S.

No. 80-1429

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DUANE YOUNGBERG, et al.,

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT NICHOLAS ROMEO

EDMOND A. TIRYAK
Counsel for Respondent
Nicholas Romeo

COMMUNITY LEGAL SERVICES, INC.
Developmentally Disabled
Advocacy Project
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134
Tele: (215) 427-4885

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Whether review of the Court of Appeals' decision is premature, when the clear error of the trial court in excluding all expert testimony leaves the present record devoid of important evidence, requiring retrial under any standard on the merits.

II. Whether a unanimous decision by the Court of Appeals, sitting en banc, that the trial court had erred in exclusively utilizing the Eighth Amendment in evaluating the conditions of confinement of an institutionalized retarded individual merits review by this Court.

III. Whether a retarded individual, involuntarily institutionalized under state law for care and treatment, has due process rights:

a. to be protected from repeated attacks and injuries to his person;

b. to be free of unnecessary shackles absent an emergency; and

c. to receive treatment which bears a coherent relationship to his needs.

IV. Whether petitioners' contention that they are entitled to good faith immunity as a matter of law merits review by this Court when the issue was neither raised nor decided below.

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DUANE YOUNGBERG, et al.,

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

BRIEF IN OPPOSITION OF NICHOLAS ROMEO

Respondent Nicholas Romeo respectfully requests that this Court deny the petition for writ of certiorari seeking review of the judgment and opinion of the Third Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, sitting en banc is not yet reported. It is reprinted in Petitioners' Appendix at 1a.

The judgment of the district court, which was a jury verdict in favor of all defendants, is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 24, 1980. Petitioners would invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Eighth Amendment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law...

United States Statute

42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Pennsylvania Statutes

Pa. Stat. Ann. tit. 50, §4401(c):

> Whenever a court commits any person under any provision of this act, it may commit such person directly to a facility willing and able to receive him; otherwise, the court shall commit to a designated local or State facility, or to the Veterans Administration or other agency of the United States upon receipt of a certificate that the person is eligible for such hospitalization and there is available space for his care.

Pa. Stat. Ann. tit. 50, §4406:

> (a) Whenever a person is believed to be mentally disabled, and in need of care or treatment by reason of such mental disability, and examination of such person has been made by a physician or physicians, or for any reason the examination of such person cannot be made, a petition may be presented to the court of common pleas of the county in which a person resides or is, for his immediate examination or commitment to an appropriate facility for examination, observation and diagnosis.
>
> (b) If, upon examination, it is determined that such person is in need of care at a facility, the examining physicians or director, as the case may be, shall immediately report to said court which may order the commitment of such person for care and treatment.

* * *

Pa. Stat. Ann. tit. 50, §4422:

> Mechanical restraints shall not be used or applied to a mentally disabled person, except:
>
> (1) When necessary to prevent such person from harming himself or others when being transported as provided in sections 405 or 421, or
>
> (2) Whenever the director of a facility or his designee determine that such are required by the medical needs of such person admitted or committed, in which case the same may be used or applied only in accordance with regulations of the department.

STATEMENT OF THE CASE

Petitioners seek review by this Court of the unanimous, en banc decision of the Court of Appeals. All nine judges of the Third Circuit held that critical trial errors by the district court in excluding all expert testimony and charging the jury mandated that the jury verdict for defendants be set aside and a new trial held.[1]

Nicholas Romeo is a thirty-one year old individual who is profoundly retarded.[2] For the first twenty-six years of his life, he lived with his parents and retarded aunt in Philadelphia. (N.T. 1-31).[3] In 1974, Nicholas Romeo's father died suddenly and Mrs. Romeo, unable to obtain assistance for his care in the community, sought his admission to a facility for the retarded. On July 11, 1974, a Pennsylvania Court committed him to the Pennhurst State School and Hospital "for care and treatment" pursuant to the involuntary commitment provisions of Pennsylvania law. (Ap. 34a). See Pa. Stat. Ann. tit. 50, §4406(b).[4]

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[1] See Opinion of the Court, per Judge Adams (joined by Judges Gibbons, Weis, Higginbotham and Sloviter) at Ap.3a. See also Concurring Opinion of Chief Judge Seitz (joined by Judges Aldisert, Rosenn and Garth) at Ap. 48a.

[2] Nicholas Romeo is an unnamed class member in Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295 (E.D. Pa. 1977), aff'd, 612 F.2d 84 (3d Cir. 1979) (en banc), cert. granted, 100 S.Ct. 2984 (1980). While this Court is reviewing aspects of that case involving deinstitutionalization, this action involves questions solely concerned with the quality of care provided to a single resident within Pennhurst.

[3] References herein to "N.T." designate items contained in the trial transcript. References to "Ap." designate items in petitioners' appendix.

[4] Under Pennsylvania law, commitment to a mental retardation institution may be made only if the facility is "willing and able" to receive such person. See Pa. Stat. Ann. tit. 50, §4401(c).

It is undisputed that between September 12, 1974 and September 23, 1976, Nicholas Romeo was injured on seventy-seven occasions at Pennhurst. The injuries included a broken arm, a fractured finger, injuries to his sexual organs, human bite marks, lacerations, scratches and black eyes.[5] (Ap. 5a). Some of plaintiff's injuries became infected from inadequate medical treatment or from human feces that the Pennhurst staff failed to clean up. (Ap. 5a).

Having failed to obtain better protection for her son by means of her repeated complaints to Pennhurst officials, Mrs. Romeo filed this action in November, 1976. It sought damages under 42 U.S.C. §1983 against them for failing to protect her son from these repeated attacks. Subsequently, the complaint was amended to state additional claims that defendants had failed to provide Nicholas Romeo with treatment and had unnecessarily shackled him to a bed or chair for long periods of time each day. The Amended Complaint alleged that defendants maliciously had taken these actions against Nicholas Romeo after the commencement of the litigation, in retribution for filing it. (Ap. 86a-92a).

Trial began on April 17, 1978. As to protection, Pennhurst records established that plaintiff had been injured on seventy-seven occasions. Evidence was provided that each defendant was aware of some or all of the injuries. (Ap. 5a). It was not contested that each defendant was responsible for the safety and treatment of plaintiff while at Pennhurst. (Ap. 6a, n.3).

---

[5] Petitioners inaccurately state that the repeated attacks upon Nicholas Romeo by other Pennhurst residents came "mostly" in retaliation for his aggressive actions. An examination of Pennhurst records, admitted into evidence at trial, demonstrates that in only two of seventy-seven cases of injury to Nicholas Romeo was there any suggestion at all that an attack upon him was provoked in any way. See Plaintiff's Exhibit P-5.

As to the claim of unnecessary shackling, defendants admitted that for more than a year since the initiation of litigation, Nicholas Romeo had been shackled to his bed or chair for long periods each day. (N.T. 2-130; Ap. 14a, n.20). In contrast, Nicholas had moved about freely for the twenty-six years that he lived at home with his family (N.T. 1-35-1-37) and restraints had rarely been used upon him at Pennhurst prior to the initiation of the lawsuit. (N.T. 4-188; 5-218).

As to treatment, defendants admitted that Nicholas Romeo received no treatment whatsoever for six full months following the filing of this lawsuit. (N.T. 6-161). Although Nicholas had previously received some treatment at Pennhurst, the quality and amount of that treatment had been found as a fact to be "inappropriate and inadequate." See Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295, 1304 (E.D. Pa. 1977), aff'd, 612 F.2d 84 (3d Cir. 1979)(en banc), cert. granted, 100 S.Ct. 2984 (1980).

At trial, the district court ruled that Estelle v. Gamble, 429 U.S. 97 (1976)[6] controlled all of plaintiff's claims. The trial court interpreted that decision to mean that evidence offered to prove the existence of measures which would have protected plaintiff from repeated violence and which were not utilized by defendants was irrelevant as a matter of law.[7]

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[6]The trial court, of course, was without benefit of this Court's later decision in Bell v. Wolfish, 441 U.S. 520 (1979) ruling that claims under the Eighth Amendment were applicable only to confinement related to criminal incarceration.

[7]The trial court made that interpretation of Estelle clear:

> ... You are not to decide whether Nicholas could have been treated in some other fashion or whether it could have been done in some other way or better way. That is not the issue in this case. (N.T. 8-18)
>
> It makes no difference that somebody else would have done it differently. (N.T. 7-93)

As a result of the trial court's interpretation of Estelle, it barred the presentation of all expert testimony,[8] and based its instructions to the jury on the Eighth Amendment. On April 26, 1978 the jury found for defendants.

On November 24, 1980, the Third Circuit Court of Appeals, sitting en banc , unanimously vacated that judgment, and remanded for a new trial. All nine judges of that Court agreed that the district court had erred in its blanket exclusion of plaintiff's expert testimony and, following this Court's direction in Bell v. Wolfish, 441 U.S. 520 (1979), determined that the Eighth Amendment was an erroneous standard for evaluating the rights of the institutionalized retarded. (Ap. 3a).

Having so ruled, the Circuit Court majority set forth for the district court "guidance" (Ap.31a) concerning "what may provide a beginning point for a set of jury instructions in a matter of this type." (Ap. 41a).[9]

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[8]The proferred expert testimony (Ap. 97a-104a) would have shown that:

(1) the lack of treatment provided to the residents at Pennhurst was a direct cause of the violence on the wards in which plaintiff resided;

(2) given the enforced inactivity on the wards, the residents of Pennhurst learned violent behavior as their only means of receiving staff attention;

(3) plaintiff's injuries were "excessive and potentially mutilating, and that appropriate programming of the residents would have prevented much of the violence leading to plaintiff's injuries; and

(4) the prolonged use of shackles on plaintiff after the lawsuit began had no treatment purpose whatsoever, but was used for the convenience of staff.

[9]The Circuit Court also cautioned the trial court that "the specific instructions submitted to the jury must be carefully structured to reflect the actual record that is developed on remand." (Ap. 41a). Thus, to the extent that any issue in this case is deemed worthy of review by this Court, that review would be more appropriate after retrial, when actual instructions are crafted by the district court.

With respect to plaintiff's claim that the defendants had a duty to protect him from repeated attacks while confined at Pennhurst, the Court of Appeals held that plaintiff clearly has a right to have his physical safety protected. (Ap. 23a). The Court recognized that while this right "is not activated by an isolated mishap, or ... by each bruise that a patient may suffer, a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right." (Ap. 23a). In the case of such repeated injuries, defendants' failure to provide for the personal security of plaintiff could be justified only upon grounds of substantial necessity. (Ap. 25a).

With respect to the claim of unnecessary shackling, the Court found that under the Due Process Clause of the Fourteenth Amendment, shackling a resident in non-emergency situations could be justified only when the use of shackles "was essential to protect the patient or treat him." (Ap. 18a).[10] The Court of Appeals also offered an alternative formulation of this holding, finding that shackling a patient was permissible if shackles were the least restrictive means of dealing with the patient in light of his problems and the surrounding environment. (Ap. 18a-19a).[11]

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[10]The Court did not explain what standard should be applied in emergencies, as this issue was not presented, given defendants' routine and daily use of shackles upon plaintiff and others, see Halderman v. Pennhurst State School and Hospital, 446 F.Supp. 1295, 1306 (E.D. Pa. 1977) aff'd, 612 F.2d 84 (3d Cir. 1979)(en banc), cert. granted, 100 S.Ct. 2984 (1980).

[11]Petitioners mischaracterize the holding of the Circuit Court on this point. At n.14 of their brief, petitioners portray the decision as stating "the use of restraints to protect others is not permissible under any circumstances."

The Circuit Court utilized a three part standard with respect to plaintiff's claims that he had been denied treatment while at Pennhurst. Because plaintiff was involuntarily confined for the purpose of treatment, the Court of Appeals reasoned that a complete failure to treat him would be unlawful absent a compelling explanation. (Ap. 47a). On the other extreme, the Court of Appeals held that the involuntary utilization of a mode of treatment subjecting plaintiff to "significant deprivations of liberty"[12] was unlawful unless it was the least restrictive mode available to accomplish the purpose. (Ap. 31a). Thus, in such rare situations where "unalterable interferences with bodily integrity" are involved, the Court of Appeals ruled that "law and not medicine is the ultimate decisionmaker." (Ap. 31a).

The Court of Appeals explicitly refused to utilize the least restrictive principle in reviewing day-to-day treatment decisions not involving permanent bodily changes:

> ... the application of a consitutional standard of "least intrusive alternative" on continuing treatment programs, which often involve qualitative medical determinations subject to daily, possibly hourly changes, would prove unworkable.

(Ap. 32a).[13]

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[12]The Circuit Court gave several examples of such liberty deprivations: prefrontal labotomy, sterilization, and convulsive therapy. (Ap. 30a, n.44 and accompanying text).

[13]Petitioners erroneously characterize this carefully limited holding as requiring them "to engage in a delicate balancing of constitutional rights in nearly every treatment decision." Petitioners' Brief, at 16.

Having rejected the least restrictive alternative standard for the day-to-day program decisions under review in this case, the Court of Appeals held that defendants must provide treatment to plaintiff which is "acceptable" in the light of present medical or other scientific knowledge. (Ap. 47a). To be acceptable, the Court required simply that a "coherent relationship" exist between the treatment provided and a resident's needs. (Ap. 38a-39a).

Finally, although the issue of immunity was not raised on appeal (Ap. 48a, n.1), the Court of Appeals reminded the trial court that defendants were entitled to a jury instruction concerning the parameters of the "good faith" defense. (Ap. 43a-44a).

Petitioners, rather than waiting to determine the manner in which the district court crafts actual jury instructions from these holdings based upon a fuller record developed upon remand, seek a writ of certiorari from this decision.

REASONS FOR DENYING THE WRIT

I. REVIEW OF THE COURT OF APPEALS DECISION IS PREMATURE, SINCE THE UNPRECEDENTED EXCLUSION OF ALL EXPERT TESTIMONY BY THE TRIAL COURT PREVENTED THE DEVELOPMENT OF AN ADEQUATE RECORD, REQUIRING RETRIAL UNDER ANY STANDARD TO BE APPLIED ON THE MERITS.

The important policy issues present in this case involve a complex interplay between law and medicine. Unfortunately, because of the trial court's blanket exclusion of all expert testimony, the case in its present posture provides this Court with a limited basis upon which to balance these conflicting considerations in crafting the final resolution of these questions.

Nicholas Romeo's claims involve fundamental issues of personal security, unnecessary shackling and a denial of treatment. Petitioners seek a decision by this Court defining the point at which state officials incur liability for their failure to provide care and treatment to involuntarily confined residents. That decision would best be made upon a record which contains expert testimony concerning the availability and efficacy of alternative forms of care and treatment, and their cost.

The clear error of the trial court in excluding all expert testimony has left this record devoid of information on these important subjects.

Whether or not petitioners are correct that the Court of Appeals erroneously evaluated the standards to be applied to plaintiff's claims on remand, a retrial will be necessary. Indeed, all nine judges of the Court of Appeals, including those whose views petitioners espouse here, agreed that the blanket exclusion of expert testimony by the trial court mandated a new trial. (Ap. 3a; 48a).

If, as petitioners contend, [14] the questions posed here are worthy of this Court's consideration, that review would more appropriately await retrial, when a more complete record would be available to this Court. For as Justice Frankfurter has observed, "wise adjudication has its own time for ripening." Maryland v. Baltimore Radio Show, 338 U.S. 912, 918 (1920) (certiorari may properly be denied where record is "cloudy.") See also Oliphant v. Brotherhood of Locomotive Firemen, 359 U.S. 935 (1959) (certiorari denied due to "abstract context in which the issues sought to be raised are presented by this record...").

II. THE UNANIMOUS DECISION OF THE COURT OF APPEALS, SITTING EN BANC, FAITHFULLY APPLIED THE PRINCIPLES OF BELL v. WOLFISH, IN RULING THAT THE FOURTEENTH AND NOT THE EIGHTH AMENDMENT SHOULD BE UTILIZED IN EVALUATING THE CONDITIONS OF CONFINEMENT OF AN INSTITUTIONALIZED RETARDED INDIVIDUAL.

In vacating the jury verdict for defendants in this matter, the Court of Appeals emphasized that recognition that the case should be controlled by due process, and not cruel and unusual principles was "of critical importance." (Ap. 7a).

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[14] The Petition for Certiorari in this case reads as if it were a petition for rehearing in Pennhurst State School and Hospital v. Halderman, 100 S.Ct. 2984 (1980) or a petition for certiorari in Scott v. Plante, __F.2d__, Nos. 80-1314, 1315 (3d Cir. 1981). It is neither.

This case involves retardation only. Whatever questions there may be concerning the creation of analogous institutional rights for the mentally ill are posed squarely in Scott v. Plante, supra; no such questions are in any way posed in this case. Petitioners have ignored this Court's admonition that "careful attention must be paid to the differences between the mentally ill and mentally retarded." Kremens v. Bartley, 431 U.S. 119, 135-6 (1977).

To the extent that this case well poses any question concerning the rights of retarded people to adequate care and treatment when involuntarily institutionalized, it is a question which is non-recurring, for Congress has, in the Developmentally Disabled Assistance Bill of Rights Act, 42 U.S.C. §6001 et seq., created more stringent standards than the minimal constitutional standards delineated by the Court of Appeals. Thus future litigants, whose claims postdate the new statute, will utilize that statute, rather than the decision here, in pressing their claims.

In so doing, the Court of Appeals faithfully followed the prior decisions of this Court:

> Although the complaint alleged Eighth as well as Fourteenth Amendment violations, Ingraham v. Wright [430 U.S. 651 (1977)] and Bell v. Wolfish, [441 U.S. 520 (1979)] would appear to preclude reliance on the minimal safeguards of the Eighth Amendment in a non-criminal context.

(Ap. 8a)(footnotes omitted).[15]

Thus, because the trial court had based its jury instructions and exclusion of plaintiff's expert testimony upon its interpretation of Eighth Amendment principles, as set forth in Estelle v. Gamble, supra, the Court of Appeals vacated the decision and remanded for a new trial. This outcome is clearly warranted given the erroneous instructions and the unprecedented exclusion of expert testimony by the trial court in a case of this kind.

Significantly, petitioners do not contend that the Eighth Amendment was properly used by the trial court in instructing the jury and excluding expert testimony. Nor do petitioners contend that the nine judges of the Court of Appeals were wrong in vacating the judgment and remanding for a new trial.

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[15]Petitioners incorrectly contend that the lack of clarity of plaintiff's claims led the district court to construe them as arising solely under the Eighth Amendment. On the contrary, respondent sought jury instructions specifically listing the Fourteenth Amendment as a source of claims separate and apart from the Eighth Amendment claims asserted. See, e.g., Plaintiff's Proposed Jury Instruction No. 11 ("Plaintiff also contends that his rights under the Fourteenth Amendment to the United States Constitution were violated by defendants.")(Ap. 94a).

Rather, petitioners assert that questions of great public importance are presented by the guidelines set forth by the Court of Appeals to the district court concerning how it should craft jury instructions upon remand. But review of this case would be more appropriate after retrial, when actual jury instructions are developed by the district court, based upon the more complete record developed at that time.

III. THE GUIDANCE GIVEN BY THE COURT OF APPEALS TO THE TRIAL COURT CONCERNING THE CRAFTING OF APPROPRIATE JURY INSTRUCTIONS ON REMAND DOES NOT MERIT REVIEW BY THIS COURT.

A. The Decision Of The Court Of Appeals That Plaintiff Had A Right To Be Protected From Repeated Attacks Upon His Person Is Consistent With The Decisions Of Five Other Circuit Courts And Does Not Merit Review By This Court.

The Court of Appeals ruled that plaintiff had a right under the Fourteenth Amendment to have his physical security protected while involuntarily institutionalized at Pennhurst. The Court found that while such a right "is not activated by an isolated mishap, or ... by each bruise that a patient may suffer ... a pattern of attacks, injuries or violent behavior such as we have here would create a claim to such a right." (Ap. 23a). In explaining the right to physical safety the Court held that defendants would be liable[16] for such a series of injuries "unless they can offer explanations based on important interests." (Ap. 26a).

[16]The Court of Appeals also found that "the evidence also suggests that the defendant knew, or had reason to know, of some or all of the injuries suffered by the plaintiff. (Ap. 21a).

Petitioners assert that such a standard will create confusion and an inability to provide treatment on the part of state officials. Their contention is without merit.

Every federal court that has considered the question has determined that state officials who are responsible for operating institutions for the retarded or mentally ill have a duty to protect involuntarily committed residents from repeated attacks by other residents. See, e.g., Rogers v. Okin, 634 F.2d 650, 655-6 (1st Cir. 1980); Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978); Harper v. Cserr, 544 F.2d 1121 (1st Cir. 1976); Spence v. Staras, 507 F.2d 554 (7th Cir. 1978); Halderman v. Pennhurst State School and Hospital, supra; Welsch v. Likens, 373 F.Supp. 487 (D. Minn. 1974), aff'd in part, vacated and remanded in part, 550 F.2d 1122 (8th Cir. 1977); New York State Ass'n for Retarded Citizens, Inc. v. Rockefeller, 357 F.Supp. 752 (E.D. N.Y. 1973).

In fact, all courts of the United States are in agreement that even prisoners, who are confined in part for purposes of punishment, have a constitutional right to be protected from their fellow inmates. See, e.g., Woodhous v. Comm. of Virginia, 487 F.2d 889 (4th Cir. 1973); Holt v. Sarver, 309 F.Supp. 362 (E.D. Ark. 1970) aff'd, 442 F.2d 304 (8th Cir. 1971) aff'd sub nom., Hutto v. Finney, 437 U.S. 687 (1978); Roberts v. Williams, 302 F.Supp. 972 (N.D. Miss. 1969), modified, 456 F.2d 819 (5th Cir. 1971), cert. denied, 404 U.S. 866 1971).

Whether because of the complete unanimity of the lower courts, or the obvious nature of the proposition, this Court has never reached the question of whether state hospital officials have a duty to protect residents of their facilities from

repeated attacks upon their person. This Court has, however, consistently held that the concept of liberty has encompassed the "right to be free from and to obtain judicial relief for unjustified intrusions on personal security." Ingraham v. Wright, 430 U.S. 651, 673 (1977). Accord, Hutto v. Finney, 437 U.S. 687 (1978) (affirming remedial measures designed, inter alia, to protect prisoners from rampant violence.)

In determining that administrators "must offer explanations based upon important state interests" for their failure to prevent a repeated series of attacks upon plaintiff, the Court of Appeals in this case did no more than reformulate this Court's language in Ingraham. The Court of Appeals' decision is neither novel, unusual, nor as petitioners contend, harmful.[17]

B. The Court Of Appeals' Decision That Non-Essential Shackles May Not, Absent Emergencies, Be Used On The Retarded Is Unexceptional And Consistent With The Decisions Of All Other Lower Courts.

The Court of Appeals held that non-emergency use of shackles upon an involuntarily-confined retarded individual is justifiable only when "essential to protect the patient or treat him."[18] (Ap. 18a). If less harsh, alternative mechanisms would not deal with the patient "in light of his problems and the surrounding environment" (Ap. 18a), then the use of restraints would be permissible.

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[17] Petitioners' contention that, as a result of this decision, the federal courts will become "the repositories" of personal injury claims by the 150,000 institutionalized retarded is groundless. The proposition rests upon the notion that the gross violation of Nicholas Romeo's rights at Pennhurst is likely to be duplicated elsewhere. If so, respondent would suggest that similar cases would appropriately grace the dockets of the federal courts. However, this too is unlikely, since as Chief Judge Seitz noted in his dissent in Halderman, Pennhurst is "one of the worst institutions of its kind in the world." 612 F.2d at 117 (citing filth, enforced inactivity, violence and "other horrors.") It is therefore unlikely that other retarded individuals in institutions have, as here, suffered from a long series of serious physical assaults.

[18] While this Court has never reached the issue, it has in a recent case assumed that involuntarily committed children have a protectable liberty interest "in being free of unnecessary bodily restraints." Parham v. J.R., 442 U.S. 584 (1979).

Such a proposition is neither novel[19] nor unprecedented.[20] The lower courts are unanimous in holding that intrusive measures such as shackles may be utilized only if less intrusive techniques will not accomplish the same purpose. See, e.g., Halderman v. Pennhurst State School and Hospital, supra; New York State Ass'n for Retarded Children v. Carey, 596 F.2d 27, 30 (2d Cir. 1979); Campbell v. McGruder, 580 F.2d 521, 550 (D.C. Cir. 1978); Welsch v. Likens, 550 F.2d 1122, 1125-6 (8th Cir. 1977); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

As this Court has previously noted, were a person to be shackled and thrown into a dungeon

> "it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish."

Bell v. Wolfish, supra, 441 at 539 n.20.

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[19] Although both the petitioners and a concurring judge below have expressed a belief that the least restrictive standard is unworkable in the context of institutional care, it is undisputed that internal Pennhurst procedures required that the least restrictive procedure be followed. See, e.g., Ap. 99a-100a.

[20] Given the passage of the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6001 et seq., it is unlikely that the minimal constitutional safeguards found by the Circuit Court with respect to shackles will be used in future cases. In that Act, shackles are outlawed unless "absolutely necessary." 42 U.S.C. §6010(3)(B)(iii). Thus future litigants will utilize the more stringent statutory standard when claims concerning the utilization of unnecessary restraints are made.

Logically, the Circuit Court's analysis turns upon the question of necessity. In non-emergency situations, shackles are justified if less harsh or intrusive methods would fail to deal with the patient. The non-existence of less harsh alternatives can only mean that shackles are necessary. If means less intrusive than shackles would deal with the problem, then shackles are unnecessary. Unnecessary use of shackles is unlawful.[21]

As used at Pennhurst, physical restraints are potentially harmful, impair the treatment process, and are utilized to control residents in lieu of treatment on a routine basis. See Halderman, supra, 446 F.Supp. at 1306-7. In the instant case, petitioners admitted shackling plaintiff to his bed or chair for long periods of time each day. Plaintiff's experts were prepared to testify that shackles were used on him for the convenience of staff, and had no treatment purposes whatsoever.[22]

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[21]Nor is the concept of restricting state intrusions on fundamental rights to the least restrictive means available to accomplish the legitimate state purpose unclear or alien. This Court has utilized the standard in a number of contexts. See, e.g., Procunier v. Martinez, 416 U.S. 396, 413-414 (1974) (prisoners' First Amendment rights to communicate to outsiders may be curtailed only if restriction imposed is no greater than necessary); Dunn v. Blumstein, 405 U.S. 330 (1972) (state 90 day voting residency requirement unlawful where lesser alternative means to prevent fraud available); Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved."); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (invalidating city ban on sale of milk processed non-locally when less drastic inspection would serve interest in ensuring mile wholesome).

[22]As the Court below observed, under Pennsylvania law, shackles may not be applied to a retarded individual unless the director of a facility determines "that such are required by the medical needs of such person...." Pa. Stat. Ann. tit. 50, §4422. No such determination was made in this case.

Given the unanimity of decisions by all lower courts on this issue, petitioners' inability to articulate a standard appropriate to review the use of mechanical restraints upon citizens of the United States, and their documented abuse of restraint methods,[23] the decision limiting the use of shackles is not one of great public importance.[24]

C. The Court Of Appeals' Decision That An Involuntarily Committed Retarded Individual Had A Right To Treatment Having A Coherent Relationship To His Needs Arose From State Law, And Does Not Create A Federal Malpractice Tort.

This Court has recognized that the involuntary confinement of an individual such as Nicholas Romeo entails a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). To be justified, that restriction on freedom must have a purpose. "At the least," this Court has ruled unanimously with respect to the involuntary confinement of the retarded without treatment, "due process requires that the nature and duration of commitment bear some reasonable relation to the purposes for which the individual is committed." Jackson v. Indiana, 406 U.S. 715, 738 (1972).

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[23] Petitioners state that the Court of Appeals reference to cells "exemplifies its lack of understanding of the subject matter ..." (Petitioners' Brief at 17, n.30.) But see Halderman, supra, 446 F.Supp. at 1306 n.34 and accompanying text. (Finding that the staff at Pennhurst punishes aggressive behavior by placing residents in "seclusion rooms" -- small rooms with hard walls and floors, many of which "have exposed rediators, and other potentials for danger to the resident placed within it.")

[24] Defendants have not asserted that shackling an individual does not impact upon his due process liberty interest. This Court has recognized that "the contours of this historic liberty interest ... always have been thought to encompass freedom from bodily restraint ...." Ingraham v. Wright, 430 U.S. 651, 673-4 (1977).

The purpose of commitment in this case, the Court of Appeals held, is clearly set forth in state law. For, as Chief Judge Seitz noted in concurring: "the state does not contest that it has placed the plaintiff in Pennhurst to provide basic care and treatment." (Ap. 55a).

The Court of Appeals found that a due process interest in treatment arose because, in involuntarily committing Nicholas Romeo to Pennhurst, Pennsylvania deprived him of liberty upon the promise of "care and treatment." Pa. Stat. Ann. tit. 50, §4406(b). When a state conditions the denial of a fundamental interest upon the ground of treatment, "it is plainly unacceptable to suggest that courts are powerless to determine whether the asserted ground is present." O'Connor v. Donaldson, 422 U.S. 563, 574 (1974)(n.10).

That state law requires treatment is indisputable. The Pennsylvania Supreme Court has held unanimously that the state statute involved in this case mandates the provision of treatment to the retarded in Pennsylvania.[25] See In Re Schmidt, __Pa.__, 425 A.2d 393 (1981). See also In Re Guzman, __Pa.__ Cmwlth.-Ct.__, 405 A.2d 1036, 1038 (1979)("when the state ... commits retarded persons it must provide 'minimally adequate habilitation'"); County of Allegheny v. Commonwealth Department of Public Welfare, 33 Pa. Cmwlth. Ct. 267, 381 A.2d 1014, 1016 (1978). See also Com. ex rel. DiEmilio v. Shovlin, 449 Pa. 177, 295 A.2d 320 (1972).

[25]Despite the unanimous decision of the Supreme Court of Pennsylvania in Schmidt, petitioners maintain that Pennsylvania law mandates only that care be provided to the institutional retarded. See Petitioners' Brief at 18.

Similarly, several decisions of the federal courts sitting in Pennsylvania have read the statute as mandating treatment. See, e.g., Eubanks v. Clarke, 434 F.Supp. 1022, 1026-7 (E.D. Pa. 1977)(Lord, Ch.J.); Halderman v. Pennhurst State School and Hospital, supra, 446 F.Supp. at 1322.

Whatever the case may be in other jurisdictions, Pennsylvania law mandates that the involuntarily confined retarded receive treatment.[26]

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[26] Ignoring the fact that both the Supreme Court of Pennsylvania and the Court of Appeals have unanimously interpreted Pennsylvania law as mandating treatment, Petitioners contend that Pa. Stat. Ann. tit. 50, §4406(a) requires only that care be provided to the institutionalized retarded.

Clearly, Pa. Stat. Ann. tit. 50, §4406(a) is a statutory provision designed to provide for involuntary examinations of persons to determine if treatment is necessary. Just as clearly, Pa. Stat. Ann. tit. 50, §4406(b) provides that after such an examination, the local court "may order the commitment of such person for care and treatment." Thus Nicholas Romeo's deprivation of liberty was conditioned upon a state law created expectation of care and treatment.

Even if, as petitioners contend, plaintiff's liberty interest could have been fulfilled by the provision of care "or" treatment, it does not follow that Nicholas Romeo's liberty interest would be extinguished. This is true because petitioners have also failed to provide him with care. It is undisputed that Nicholas Romeo received seventy-seven injuries while at Pennhurst, some of which became infected as a result of fecal matter or unsanitary medical treatment. Thus defendants can hardly be said to have extinguished his liberty interest in treatment as a result of the provision of minimally humane care. See Wyatt v. Aderholt, supra, (rejecting Alabama's claim that involuntary commitment without treatment can be constitutionally justified on the basis of the provision of care alone, where minimal care is not provided.)

While other states may have failed to create through statute a liberty interest in treatment for the involuntarily institutionalized retarded, Pennsylvania clearly has done so. Petitioners' attempt to alter this plain fact by reliance on a statutory provision which was not the basis of the decision below, and by ignoring the interpretation of the statute by both Pennsylvania appellate and local federal courts is delusive.

Having found a due process liberty interest in treatment arising from Pennsylvania law,[27] the Court of Appeals was required to determine if the interest in treatment was fulfilled by petitioners.

In doing so, the Court of Appeals carefully limited its decision with respect to plaintiff's claim that he was denied treatment, precisely because it recognized that "questions of a court's relative competence concerning medical decisions and respect for medical judgment, as well as concerns of comity with the legislative and executive branches, place this claim in a different perspective." (Ap. 27a).

Given the lack of clarity of the record in this case, occasioned by the district court's wholesale exclusion of expert testimony, the Court of Appeals was required to address the treatment issue in a number of contexts.[28] First, it held that defendants would be liable for a complete failure to provide any treatment to plaintiff, absent a compelling justification.

On the other extreme from a complete lack of treatment is the use of involuntary treatment techniques such as "nonreversible physical operations," (Ap. 30a) "permanent physical alterations" (Ap. 30a) or other modes of treatment which cause "significant deprivations of liberty." (Ap. 47a). In such situations, due to the "existence of a judically assessible, discrete act, which entails a significant loss of individual liberty ...' (Ap. 30a), the Court of Appeals ruled that such treatment techniques

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[27]Because Pennsylvania law created an expectation of treatment, the Court of Appeals in this case had no occasion to reach the question of whether the provision of needed custodial care without treatment can justify the involuntary confinement of the retarded.

[28]Indeed, it would be more appropriate for this Court to review the instant case after re-trial, after a fuller record is developed, when it can be ascertained which, if any, of the treatment charges is given by the trial court.

may not be involuntarily utilized unless they are the least intrusive available. (Ap. 47a).

The Court of Appeals carefully recognized however, that most treatment questions fall between these two extremes. In such cases "legal questions of unconstitutional liberty deprivations begin to merge with medical judgments ..." (Ap. 31a). Thus, the Court rejected as "unworkable" the use of the least intrusive analysis for such treatment decisions "which often involve qualitative medical determinations subject to daily, possibly hourly changes ..." (Ap. 32a). Instead, the Court of Appeals held that plaintiff was entitled to a form of treatment which is "acceptable" in light of present medical or other scientific knowledge. (Ap. 38a). To be acceptable the Court required simply that a "coherent relationship" must exist between a patient's needs and the treatment provided.[29] (Ap. 38a).

In holding that due process requires that the treatment provided have a coherent relationship to the resident's needs, the Court of Appeals did no more than follow the stricture of this Court in Jackson v. Indiana, supra, that, at a minimum, there be "some reasonable relation" between the purpose and nature of the confinement of the retarded.[30] The limited constitutional

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[29]The limited constitutional standard enunciated by the Court of Appeals with respect to treatment claims is unlikely to be utilized by future litigants. This is so because a recent federal statute requires that "adequate" treatment be provided to the institutional retarded. 42 U.S.C. §6010(1) and (2). While the Court of Appeals was compelled to reach the constitutional issue because a portion of Nicholas Romeo's claims predate that statute, future ligigants will most certainly utilize the more stringent statutory standard than the limited requirement set forth in this case.

[30]Whatever differences may exist between the "coherent relationship" standard adopted by the Court of Appeals and the standard utilized by this Court in Jackson need not detain us here. It is sufficient to note that, to the extent that any difference in standard exists, that difference does not present issues of great public importance.

requirement that a coherent relationship exist is neither wrong,[31] not akin to malpractice as petitioners maintain.[32]

IV. PETITIONERS' CONTENTION THAT THEY ARE ENTITLED TO "GOOD FAITH" IMMUNITY AS A MATTER OF LAW DOES NOT MERIT REVIEW BY THIS COURT, SINCE THE ISSUE WAS NEITHER RAISED NOR DECIDED BELOW.

Petitioners seek to raise before the Supreme Court of the United States an issue which previously was not raised or decided in this litigation: petitioner's entitlement to a "good faith" immunity as a matter of law. See Procunier v. Navarette, 434 U.S. 555 (1978). Such a defense is available to a defendant state official in a 42 U.S.C. §1983 damage suit as a matter of law, only when the official could not reasonably have known that his actions were unlawful. Id.[33] Otherwise, defendants may submit the factual question of whether they knew or should have known that their actions were unlawful to the jury. See O'Connor v. Donaldson, supra; Wood v. Strickland, 420 U.S. 308, 322 (1975).

In the instant case, defendants did not argue before the trial court that they had a good faith immunity as a matter of law. Nor did petitioners claim such a defense before the Circuit Court. Indeed, as Chief Judge Seitz noted in his concurring opinion, "the existence of a qualified immunity defense is not raised on this appeal." (Ap. 48a, n.1).

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[31] Petitioners have not contended that any conflict exists in the Circuit Courts over the issue of whether an involuntarily committed retarded indidivual can be denied treatment. All Courts of Appeal that have considered the question have found such a right to exist. See, e.g., Welsch v. Likens, 550 F.2d 1122 (8th Cir. 1977); Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 967 (1974); Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1975); Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966). Indeed, as Chief Judge Seitz noted in concurring, the "existence of a constitutional right to care and treatment is no longer a novel legal proposition." (Ap. 54a).

[32] Petitioners have not suggested in their brief what an appropriate standard for denial of treatment claims should be, but did contend below that "these defendants, as individuals, owe nothing to Nicholas Romeo." (Ap. 107a)

[33] As this Court made clear in Procunier v. Navarette, 434 U.S. 555 (1978), the good faith immunity is not available as a matter

(Cont'd next page)

Petitioners are therefore barred at this late date from seeking resolution in the Supreme Court of an issue which they had more than ample opportunity to present below. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." Youakim v. Miller, 425 U.S. 231, 233-234 (1976). See also Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 37-38 (1976); Singleton v. Wulff, 428 U.S. 106, 120 (1976).

This rule is modified only in "exceptional cases." Duignan v. United States, 274 U.S. 195, 200 (1927). See also Hormel v. Helvering, 312 U.S. 552, 558 (1941)(rule modified if the "obvious result" would be "a plain miscarriage of justice.") Here, where defendants were represented by counsel below, Pollard v. United States, 352 U.S. 359 (1957), had a full opportunity to raise an established defense, United Brotherhood of Carpenters and Joinders of America v. United States, 330 U.S. 395, 411 (1947) and have made no showing of exceptional circumstances to justify extraordinary action by this Court, Singleton v. Wulff, supra; Hormel v. Helvering, supra, this Court should decline to review petitioners' claim.[34]

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33 cont'd
of law in situations, as here, where malice is alleged. See Ap. 90a. Thus, if this Court were to review this issue, raised initially by petitioners in this Court, petitioners' claim would be groundless.

[34]Given the pendency of the Halderman litigation against these defendants since 1974, petitioners' claim of an absolute good faith immunity is, on the merits, frivolous.

CONCLUSION

For the above-stated reasons, the Court should deny the petition for a Writ of Certiorari herein.

Respectfully submitted,

EDMOND A. TIRYAK
Counsel for Respondent
Nicholas Romeo

COMMUNITY LEGAL SERVICES
Developmentally Disabled
Advocacy Project
Law Center Northeast
3156 Kensington Avenue
Philadelphia, PA 19134
Tele: (215) 427-4885

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No. 80-1429

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

DUANE YOUNGBERG, et al.

Petitioners,

v.

NICHOLAS ROMEO,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Nicholas Romeo, confined at the Pennhurst State School and Hospital, asks leave to file the attached brief in opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent was granted leave to proceed in forma pauperis in the Circuit Court below, but did not seek such status in the trial court.

The affidavit of Respondent's mother and next friend in support of this motion is attached hereto.

EDMOND A. TIRYAK
Counsel for Respondent
Nicholas Romeo

COMMUNITY LEGAL SERVICES
Developmentally Disabled
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Respondent.

AFFIDAVIT IN SUPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, Paula Romeo, being duly sworn, depose and say that I am the mother and next friend of respondent Nicholas Romeo, an incompetent, in this case; that in support of my motion to proceed without being required to prepay fees, costs or security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefore, and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. My son, Nicholas Romeo, is profoundly retarded, and has never been employed. I am a widow and presently care for my mentally retarded sister. I am not employed, and have not been since childhood.

2. My entire present source of income is $423 per month, from my deceased husband's annuity and the Veterans' Administration. Pennhurst receives $180 per month for my son's care, but those funds are not available to him to pay costs in this matter. He has no other source of income.

3. I have no checking account. I have a savings account with a current balance of $226.00. My son has no bank accounts.

4. My son owns no real estate, stocks, bonds, notes, automobiles or other valuable property. I own a 1970 Buick, and my home which was purchased in 1960 for $10,500. I own no stocks, bonds, notes or other valuable property.

5. My sister is mentally retarded, is dependent upon me, and resides with me in my home.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

PAULA ROMEO

Sworn to and subscribed
before me this 25th day
of March, 1981.

Notary Public

MARLA FRIMARK